Supreme Court, U.S.
FILED
JUL 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-156

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

W. T. "BUTCH" BURNS, et al,

Petitioners

v.

DELMAR WEST-LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT A.K.A. CHISUM INDEPENDENT SCHOOL DISTRICT AND JIM MATTOX THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Respondents

ON APPEAL FROM THE COURT OF APPEALS FOR THE SIXTY JUDICIAL DISTRICT OF TEXAS

FRANK D. MOORE
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P. O. BOX 28
COOPER, TEXAS 75432
(214)-395-2053
ATTORNEY FOR PETITIONER

July 3, 1987

QUESTION PRESENTED

Whether Art 717m-1, section 8, of the Revised Civil Statutes of the State of Texas, is in violation of the due process clause of the Constitution of the United States of America, when it allows a court to require a citizen contesting the validity of bond election to show that he is entitled to a Temporary Injunction or post a bond of a substantial amount before a trial on the merits of the issues in an election contest, or be dismissed from the cause of action and barred from questioning the election process.

PARTIES

PETITIONERS

W. T." Butch" Burns

Ted Carrington

Dwight Stegall

Respndents

Delmar-west Lamar Consolidated Independent School District which has been renamed Chisum Independent School District

Jim Mattox The Attorney General for the State of Texas

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City of Austin v. Asmussen, Cause No. 14,267	14

Statutes;

Art 717m-1, RCS	passim

JURISDICTIONAL STATEMENT

Appelants, appeals from the final judgment of the Court of Appeals for the Sixth Judicial District of Texas which upheld the 62nd District Court of Texas and which decision was refused to be reviewed by the Supreme couet of Texas on a Writ of Error and a motion for rehearing denied on April 8, 1987, by ruling that Section 717m-1, Section 8 of the the Revised Civil Statutes which can require a persons contesting a bond election can be ordered to post a bond prior to a hearing on the merits of the election contest.

OPINIONS BELOW

The order of the Trial court setting a bond appears in the appendix.

The order of the Trial court dismissing the Appellants appears in the appendix.

The judgement of the Court of Appeals for the Sixth Judicial District of Texas is

reported at 720 S.W 2nd 836.

JURISDICTION

The decision of the Court of Appeals for the Sixth Judicial District of Texas was entered on the 21st day of October 1986, a motion for rehearing in the Court of Appeals for the Sixth Judicial District was denied on the 18th day of November 1986, a Motion for a Writ of error was denied in the Supreme Court of Texas on the 11th day of February 1987 and a motion for rehearing in the Supreme Court of Texas was denied on the 8th day of April 1987.

A notice of appeal was duly filed in the Court of Appeals for the Sixth Judicial District of Texas on the 4th day of May 1987.

This appeal is being docketed in this court within 90 days from the denial of rehearing by the Supreme Court of Texas. The jurisdction of this court is invoked

under 28 U.S.C. §1257 (2)

CONSTITUTIONAL PROVISIONS AND RULES

U.S. Constitution, 1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Goverment for a redress of grievances.

U.S. Constitution, 5th Amendment

No person shall---- nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

U.S. Constitution, 14 Amendment

All persons born or naturalized in the United states, and subject to the jurisdiction of the United States and of the State wherein they reside.

HOW THE FEDERAL QUESTION WAS RAISED

In the original answer of the Appellants to the Motion for Delcaratory Judgement filed by the Appellee in which the election contest filed by the Appelants was joined the Appellant raised the question of the Constitutionality of 717m-1 section 8, as being repugnant to the Consitutuion of the United States and again on appeal to the Court of Appeals for the Sixth Judicial District the question was again raised as well as in the motion for Writ of Error the the Supreme Court of Texas.

STATEMENT OF THE CASE

Two school districts consolidated and held a bond election to issue bonds to build a new school and the Appellants filed an election contest stating the bond election had not been properly held and that is should be declared void. The Appellants pled in their pleadings several irregularities in the election procedure which would

have made the election void. The Appellees filed a Motion for Declaratory Judgement as provided for in Texas Revised Civil Statute Art 717m-1 and ask the court to join the election contest and order to Appellants to appear and show that they would be entitled to a Temporary Injunction to stop the bonds from being issued or to post a $500,000.00 bond for the amount of alleged anticipated damages, should interest rates or construction cost go up betweenthe time of filing and the time that the bonds would be issued in the future if delayed because of litigation.

The court signed an order and consolidated the election contest filed by the Appellants and the Declaratory Judgement action filed by the Appellee. The Appellee set a hearing on the bond issue. At the hearing on the bond issue the court heard the testimony of the witness of the Appellee in which he projected possible

damages should the bond issue be delayed and the testimony of the Appellants in regard to the Temporary Injunction and their lack of ability to raise enough money to pay the bond premium and the court ordered the Appellants to either post a $75,000.00 bond with in ten days or be dismissed from the suit. The election contest and the alleged violations of the election laws of the State of Texas were never heard by the court. The Appellants were unable to post the bond and their cause of action was dismissed. On appeal to the Court of Appeals for the Sixth Judicial District of Texas the Appeals upheld the trial court and the Supreme Court for the State of Texas refused to hear the matter on a Writ of Error. The Appelants have appealed to the Supreme Court of the United States.

THE QUESTION IS SUBSTANTIAL

The question of due process in which a

persons rights are impeded or restricted has long been of deep concern to the court. The right of trial is a right that is fundemental to all persons of this nation and anything that restricts or impedes this right in an erosion of our way of life.

The right of trial is just as important in civil trials involving elections and property rights as it is in criminal action and should be protected with equal vigor. One of the first cracks in a free society is the failure of its citizens to address their grievances in a court of law. History has taught us that one of the first things that citizens in dicactorships in the denial of the courts of that county.

In this case we have a very similiar situtation in which access to the courts was denied the the Appellants. The statute is question 717m-1, section 8, was passed and only applies to persons who contested bond elections. Bond elections when passed

become a burden on the public for payment and if not properly held and all the safeguards for elections are not properly followed the citizens are deprived of their property without due process of law.

In the case at bar there was a bond election and the Appellants alleged several election irregularities that could have made the election void under state law, however the Appellants were denied the opportunity to present these issues to the court as they could not show that they were entitled to a Temporary injunction and that they did not post a substantial bond. To meet the requirement to get a temporary injunction you must show that you have a probability of winning and that you will incurr irreparable damages if one is not granted. No where does the constitution say that you must first prove that you can win a law suit or you will not be able to bring the suit and yet this is the requirement of

717m-1, Section 8.

Why are the Appellants denied the access to the court because they can not risk all their life savings to have their day in court. The requirement to post a bond makes the courts only available to the indigent and the very rich.

The statute has been held constitutional by the Supreme Court of Texas in the case of Buckholts Independent School District v. Glaser, 632 S.W. 2nd 146. The court cites the legislative purpose in enacting the statute to stop "the age old practice of one disgruntld taxpayer to stop the entire bond issue by simply filing suit". Since when do not single individuals have the right to question elections and authorities, are we going to do away with individual rights and set a number that must be affected before they can contest action of officials. If we do away with one persons rights are we next going to say

that ten people do not count and then one hundred and so on until no one had to right to question officials without meeting the requirements of 717m-1, section 8 and making them post a bond. The Constitution of the United States speaks of individuals and the protection of those individual rights.

The question of posting a bond to be heard has been addressed in a federal court in Pine Township Citizen's Association v. Arnold, 453 Fed Supp 594 in which a bond was required for persons to contest a zoning decision (one made by township supervisors) to the zoning board was unconstitutional, a denial of due process and equal protection of the law.

The Appellees have cited in the courts below the unreported case of The City of Austin v Asmussen, No 42,267 (Tex. App.-Austin) writ dism'd 106 SuCt 35 (1985) as controlling where a writ of error to the

Supreme Court was refused for lack of a substantial federal question, is not controling in this case as in the Asmussen case there was a full hearing on the merits of the election contest at then same time that the bond issue was heard and the court found that it would be proper to have a bond posted before an appeal to the appeal court could be held.the case before the court at this time there has never been a hearing on the merits of the election contest, only a hearing on whether the Appellants could show thenselves entitled to a Temporary Injunction and the amount of bond that should be set which was based on speculation on what construction cost and interest might be in the future. The Appellee had sufferred no damage at the time of the hearing and the bond was set to cover speculative damages which again is a denial of due process.

The federal courts have also addressed

this issue of a partial hearing determining the entire case in Rosenberg v Baum, 153 F2nd 10 in which the court stated:

> "The remaining contention which merits a word in that a judgement decision, or determination by a judge or chancellor prior to a hearing of all the evidence amounts to a deprivation of property without due process"

In this case the trial judge only heard part of the evidence and did not hear the portion of the case on the election contest and made a decision that a bond must be posted that in effect was to decide the entire cause of action.

CONCLUSION

For the reasons stated the court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Phone(214) 395-2053
Counsel for Appellant

I hereby certify that 3 copies of the Appellants Application for Writ of Error in the above entitled and numbered cause have been served upon the following parties.

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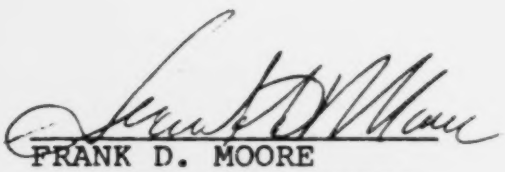
Attorney for the Appellee



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No. 51980

EX PARTE	§	DISTRICT COURT
	§	
DELMAR-WEST LAMAR CONSOLIDATED	§	62nd JUDICIAL
	§	
INDEPENDENT	§	DISTRICT
	§	
SCHOOL DISTRICT	§	LAMAR COUNTY, TEXAS

ORDER TO POST BOND

On this the 8th day of April, 1986, came on to be heard the Motion of Petitioner Delmar-West Lamar Independent School District to require all opposing parties to post bond in no less that the amount of FIVE HUNDRED THOUSAND DOLLARS AND NO/100 ($500,000.00) in the above styled and numbered cause, and the Court having heard the arguments and the evidence, finds that damages will accure by reason of delay as will be occasioned by the continued participation of the opposing parties in the proceedings in the event that Petitioner finally prevails and obtains substantially the judgment prayed for in its petition, and is of the opinion that

said Motion should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that opposing parties; W.T. "Butch" Burns, Ted Carrington, and Dwight Stegall be and are hereby required to post bond, payable to Delmar-West Lamar Independent School District in the amount of $75,000.00 to be filed within 10 days of entry of this order.

IT IS FURTHER ORDERED that if such bond is not posted within 10 days after entry of this Order, the above-named opposing parties shall be dismissed from this cause with prejudice without further hearing, and such dismissal shal be a final judgement of this court.

Signed and entered this the 8th day of April, 1986.

/s/ Paul Brown
Judge Pwesiding

No. 51980

EX PARTE	§	DISTRICT COURT
	§	
DELMAR-WEST LAMAR CONSOLIDATED	§	62nd JUDICIAL
	§	
INDEPENDENT	§	DISTRICT
	§	
SCHOOL DISTRICT	§	LAMAR COUNTY, TEXAS

ORDER

On the 8th day of April, 1986, came on to be heard the Motion of Petitioner Delmar-West Lamar Consolidated Independent School District to require all opposing parties to post bond, pursuant to Tex. Rev. Civ. Stat. Ann, Art. 717m-1 §8. On the 8th day of April 1986, this court entered and Order requiring the opposing parties in this cause, to post a bond, payable to Delmar-West Lamar Consolidated Independent School District, with sufficient surety to be approved by the court, in the amount of $75,000.00, which was to be filed within 10 days after entry of said order of April 8, 1986, that the opposing parties should be dismissed from this cause with prejudice

and without further hearing, and that such dismissal would be a final judgment of the court.

The Court having found that opposing parties have not posted a bond in the amount of $75,000.00, payable to Delmar-West Lamar Consolidated Independent School District, with sufficient surety approved by this court, within ten days after entry of this Court's Order requiring them to post bond, and that the opposing parties are named Plaintiffs in the election contest filed against Petitioner, consolidated with this cause; and that the facts and the law are with the Petitioner.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the opposing parties W. T. "Butch" Burns, Ted Carrington and Dwight Stegall are hereby dismissed from this cause with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all cost of court herein shall

and the same are hereby tax against Petitioner for all of which let execution issue.

Signed on this the 22nd day of April, 1986.

/s/ Paul Brown
Judge Pwesiding

In The Court of Appeals, Third Supreme Judicial District of Texas, at Austin

No 14,267

The City of Austin

Appellant

V.

Robert Asmussen, et al

Appellees

From the District Court of Travis County, 331st Judicial District, No 359,009, Honorable Paul R. Davis Jr, Judge Presiding

PER CURIAM

The only question presented by this appeal is whether the trial court erred in refusing to set a damage bond under the provisions of §8 of Tex. Rev Stat. Ann. art. 717m-1 (Supp 1984). This statute, hereinafter referred to as "the act," provides for prior judicial validation of securities to be issued by publc agencies.

In march 1984, the City of Austin bought suit, in accordance with §2 of the Act, seeking a declaratory judgment vali-

dating the prospective issuance and delivery of combined utility systems revenue bonds in the amount of $605,000,000 as previously authorized by an ordinance adopted by its city council.

As allowed by §7 of the act, appelles Robert Asmussen and thirty-seven other interested persons intervened in opposition to the City's request for validation. The Attorney General of Texas was made a party to the suit, in accordance with §4 of the Act.

Shortly after the intervention of the Appellees, the City filed a motion to require a bond of the intervenors, as provided for under §8 of the Act. After a pretrial hearing, the trial court denied the City's motion stating in it order:

> "In denying the motion for bond, the court does not find that the Intervenors have made a showing of provable cause under art 717m-1, section 8, but instead finds that the amount of damages and cost whcih may accure by

> reason of the delay as will be occasioned by the continued participation of Intervenors (as opposed to the delay inherent in the validation suit and bond issuance process) can be determined with sufficient exactitude to permit the setting of a bond at this time."

Contemporaneously with the hearing on the merits, but prior to the entry of judgement, the City filed a second motion to require bond of the intervenors. After a hearing, this motion was also denied. This appeal is authorized by § 8 of the Act, results.

By one point of error, the City complains of the trial court's refusal to set a bond. In response, the intervenors/appellees argue that in the absence of findings of fact and conclusions of law, whcih were not requested by the City, the order denying bond should be affirmed upon any theory of law finding support in the evidence. They then suggest that the order may be substained for any of

the following reasons: (1) there is an absence of credible evidence that (a) there will be any prospective damage to the City, (b) of any specific or particular amount, (c) attributable to any delay caused by the continued particatitation of the appellees in the proceeding; (2) because one of the appellees is indigent, no damage bond under the actmay be imposed as to any of them; and (3) the city is not entitled to make a second request for the bond.

For purpose of this opinion, we will assume that appellees' assertion as to the effect of no findings of fact and conclusions or law is correct. After a careful review of the record, however, we condlude that the court below erred in refusing to set bond under § 8 of the Act. Acccordingly, we will modify the trial court's order to require a bond of the appellees.

We begin our analysis by examining the

nature and purpose of Art. 717m-1, as explained by the Surpeme court in Buckholts Independent School District v. Glaser, 632 S.W. 2nd 146, 149 (Tex, 1982)

> "The taxpayer' [property owners', citizens' or other interested persons'] basic right to procecute a lawsuit does not insulate them from damages caused to the public agency if their suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction. In these bond cases, the mere existence of the suit acts as a temporary injunction. Bonds cannot be issued because of the existance of the suit. While the action is pending, the interest rates and construction costmay increase ---- Since the mere existance of such a suit is likely to cause damages, it is not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for damages accruing solely because of the pendency of the suit, to be paid only if the contestant should be unsuccessful in the suit. We agree----- that a legislative purpose in acting the statute was to stop "the age old practice allowing one disgruntled taxpayer to stop the entire bond issue by simply by filing suit."

In the present cause, it is undisputed that appellees did not show themselves entitled to a temporary injunction to block

the issuance of bonds. In fact, the order denying the City's second request for bond was signed by the trial court on the same day it entered judgment validating the bonds sought to be issued.

This being the case, we conclude that unless the City completely failed to show any likelihood of damage due to delay caused by appellees' continued participation in the suit, the trial court was required to set a bond under the Act. Althought the calculation of prospective damages, especially based upon rising interest rates, is by its very nature somewhat speculative, the Act explicitly authorizes consideration of such a possibility, and it is obviously does not require, to support the imposition of a bond, the certainity of the particularity that a suit on the bond itself would require. We not find such an absence of proof of the likelihood of damages.

Briefly stated, the City's evidence

indicated that of $605 million issue authorized by ordinance, there was some likelihood that $200 million, would, but not of this litigation, be issued within one year's time; that in the opinion of the City's experts the interest rates on muncipal bonds of this type were likely to rise at lesst ½% and as much as 1% during the next year; that a years delay due to any appeal prosecuted by appellees to this Court, The Supreme Court of Texas, and the U.S. Supreme Court would not be unusual; and that; assuming a twenty year average life of the $200 million in bonds, the loss to the City in the event of ½% increase in interest rates would be approximately $28 million over the life of the bonds. Without objection, the City produced evidence that a challenge directed toward an earlier bond issue of the City had consumed approximately a year, deapite an accelerated appellate schedule. See Bischoff v

City of Austin, 656 S.W. 209, 662 S.W. 2nd 156 (Tex ASpp 1983 writ ref's n.r.e.) appeal dism's and cert denied ___U.S.____, 104 S.Ct. 1699 (1984)

Viewed in its most favorable light, appellees' converting evidence will not support the trials court's order. It is not enough to show, as appellees argue to this Court, that there are many opinions regarding the rise and fall of interest rates, or that it is possible interest rates may fall as well as rise in the future, Further, appellees assertion that the proceeds from the present bond issue in dispute will not be needed by the City during the next year, due to the removal of legal impediments to the issue challenged in Bischoff, misses the mark. The bonds at issue in Bischoff are specifically ear-marked for payments to meet the City's obligations as a participant in the South Texas Nuclear Project, while the bonds at

issue is this appeal are broader in purpose. They are specifically identified by the ordinance as funds for "improving and extending the [City's] Electric Light and Power System ------It is rather obvious that while the bonds at issue in Bischoff may supply the funds for the City's particapation in that project for a year, the bond issue impeded by this suit includes funds for the general maintenance and extension of the City's electric system in a period of rapid growth and improvement.

We also reject the appellees' contention that a damage bond may not be required because one of their number is indigent. The principle that indigents, as a matter of due process and equal protection, may not be denied access to the courts for the assertion of basic rights. Boddie V Connecticut, 401 U.S. 371 (1971), is not without limitation. In reviewing the propriety of bond requirements, as applied

to indignents, the test is whether there is a rational justifiication for the imposition of bond. See U.S. v Hras, 409 U.S. 434, (1973); Ortwein v. Schwab, 410 U.S. 656 (1973). A statute imposing a bond requirement will be upheld if it rationally furthers a legitimate state interest.

In this case, a damage bond is required under § 8 of the Act

> to cover all damages and cost which amy accure by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition.

As such, this provision furthers the legitimate state interest or providing for the funding of public improvements and projects without burdensome financial penalty to the public due to delay if the opponent's challenge should prove meritless. As Required by Kras and Ortwein, the indigent litigant possesses

alternative methods of obtaining available relief, so that his right to challenge the issuance of securities is not strictly conditional upon posting of the bond. First. the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second, if a bond is imposed, an appeal from that determination is available.

Moreover, the bond requirement is a reasonable procedural provision to protect against significant financial loss to the City. Because the bond requirement is uniformly and nondiscriminatorially applied to all intervenors under the Act, indigent's rights to equal protection just because the continuation of the proceeding is conditioned upon the posting of a bond. See Lindsey v. Normet, 405 U.S. 56 (1972): Ross v Brown Title Corp., 356 F,Supp, 595 (E.D LA.) aff'sd, 412 U.S. 934 (1973). In this

context, the concept of equal protection requires that indigents have "equal" access to the courts; it does not require that they have rights superior to those of nonindigents.

We also find without merit appellees' contention that the City was not authorized to seek the imposition of a damage bond to second time during the pendency of the suit below. They cite no authority for this proposition, and the contention is not consistent with motion practice relating to releif ancillary to the metits of a cause. An interlocutory order is not res judicata of the issue it addresses. During the pendency of a cause, a trial court retains the power to modify or set aside its interlocutory orders, and to enter new orders, whether requested to do so by a party or not. Kone v Security Finance Co, 313 S.W.2nd 281, 286 (Tex. 1958); Texas Crushed Stone Co. v. Weeks, 390 S.W. 2nd

846, 849 (Tex.Civ App. 1965, writ ref'd n.r.e.)

Accordingly, we here modify the order of the trial court to require a damage bond oa all of the appellees. In setting the amount of the bond, we have taken into account the lowest potential for loss supported by the record, referable to the likely of delay occasioned by the continuation of this prceeding on the merits, reduced to present value. We are of the opinion that a bond in the amount of $2,000,000 will be sufficient to cover all damages and cost attributable to such delay. In accordance with §8 of the Act, unless the bond, with sufficient surety, is filed in this court within ten days from the date of this opinion and accompaning order, the cause of the merits now pending in this court will be dismissed. If the bond is filed, any appellee not appearing and signing as a principal thereon will be

dismissed fromt the proceedings.

Because this opinion presents no question or application of any rule of law of interest or importance to the jurispurdence of this State, it is ordered not published . Tex. R.Civ. P. Ann. 452 (Supp. 1984)

[Before Justices Shannon, Powers and Brady]
Modified to Require Dond
Filed: October 31, 1984

Court of Appeals
Sixth District
Texarkana, Texas

W.T. "Butch" Burns,
Ted Carrington, and
Dwight Stegall.....Appellants

No. 9511

Delmar-West Lamar Consolidated
Independent School District.....Appellee

)Appealed from the 62nd

)Judicial District Court

)of Lamar County, Texas

This is a school bond election appeal. Because the appellants have failed to follow the mandates of Tex. Rev. Civ. Stat. Ann. art. 717m-1, § 8 (Vernon Supp. 1986), we dismiss the appeal for want of jurisdiction.

In response to the appellant taxpayers' election contest, the appellee school district answered and filed a separate suit seeking a declaratory judgment that the

bond proceedings were valid pursuant to Tex. Rev. Civ. Stat. Ann. art. 717m-1 (Vernon Supp. 1986). The two causes were consolidated. The trial court then granted the school district's motion to require the appellants to post bond as authorized by Article 717m-1, § 8, and entered an order to this effect dated April 8, 1986. The appellants were dismissed for failure to post the bond on April 22. It is from the April 22 dismissal that the appellants bring this appeal.

Article 717m-1, § 8, in relevant part reads as follows:

> "In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, ...In the event no appeal is taken or if the

> appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings,...."

Appellants neither posted the bond nor appealed from the April 8 order requiring such bond. Article 717m-1, §8, therefore operates to deprive this court of jurisdiction to consider the appellant's contentions. Buckholts Independent School District v. Glaser, 632 S.W. 2nd 146, (Tex, 1982); Rio Grande Valley Sugar Growers v. Attorney General, 670 S.W. 2nd 399 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

Appellants contend, however, that the statute unconstitutionally deprives them of due process because it requires the posting of a bond before a final determination of the merits and as a prerequisite to an appeal, even though the plaintiffs may be

unable to make the bond.

The constitutionality of these provisions has been upheld against similiar attacks. Buckholts Independent School District v. Glaser, supra. Appellants were afforded a hearing on the feasibility of a bond being required, yet there has been no evidence brought forward here tending to show that they are indigent and no claim of indigency is raised here.

Appellants also agrue that the judgment is void, and for that reason it can be attacked on the merits here, even though they did not avail themselves of the right to appeal the judgment in the manner provided by the statute. They base their arguement on the contention that the school district was not a legal enity and therefore could not call a valid election.

As the court had jurisdiction of the proceedings and the parties below, its judgment was not void. If, as the

appellants urge, the judgment was erroneous, their remedy was to appeal by following the statute. Failing to do so, they cannot not challenge the issue which were or could have been raised in the proceeding below. Burris' Estate v. Associated Employers Insurance Co., 374 S.W. 2nd 223 (Tex. 1963); Ex Parte Sutherland, 515 S.W. 2nd 137 (Tex, Civ. App-Texarkana 1974, writ dism'd); 48 Tex. Jur. 3d Judgments § 277 (1986).

The appeal is dismissed at appellants' costs.

/s/ William J. Cornelius
Chief Justice

October 21, 1986
Filed October 21, 1986

Court of Appeals
Sixth Supreme Judicial District of Texas
Bi-State Justice Building
100 North State Line Avenue
Texarkana, Texas 75501
Louise Waldrop Lohse, Clerk

November 18, 1986

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RE: CASE NO. 06-86-09511-CV

STYLE: W. T. "Butch" Burns, Ted Carrington and Dwight Stegall

V: Delmar-West Lamar Consolidated Independent School District

The Court entered its order this date in the referenced proceeding whereby Appellants' Motion for Rehearing was OVERRULED.

PLEASE TAKE DUE NOTICE HEREOF.

Respectfully yours,

Louise Waldrop Lohse, Clerk

By /s/ Lynda Poore
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 11, 1987

Mr. Frank D. Moore
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RE: Case No. C-6088

STYLE: W. T. "BUTCH" BURNS ET AL.
v. DELMAR WEST-LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application

for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield,
Clerk

By_____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

April 8, 1987

Mr. Frank D. Moore
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RE: Case No. C-6088

STYLE: W. T. "BUTCH" BURNS ET AL.
v. DELMAR WEST-LAMAR CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT

Dear Counsel:

Today, the Supreme Court of Texas overruled the petitioner's motion for

rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ Blanca E. Morin
Deputy

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-156

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

W. T. "BUTCH" BURNS, *et al.*,
Petitioners,

v.

DELMAR-WEST LAMAR INDEPENDENT SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals for the Sixth Judicial District at Texarkana

---

Respondents' Brief in Opposition to Petition for Writ of Certiorari

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LAW OFFICES OF EARL LUNA, P.C.
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ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Whether Tex. Rev. Civ. Stat. Ann. art. 717m-1, Sec. 8, violates the Due Process clause of the 14th Amendment to the United States Constitution, because it requires a party who wishes to oppose the issuance of a public entity's bonds to post a bond in the amount of the damages that would be incurred by delay, if, after a preliminary hearing, the opposing party is unable to show facts which would be sufficient to warrant a temporary injunction against the issuance of the bonds.

LISTING OF PARTIES

W. T. "Butch" Burns, Ted Carrington, Dwight Stegall — Plaintiffs/Appellants/Petitioners

Frank D. Moore — Attorney for Plaintiffs/Appellants/Petitioners

Delmar-West Lamar Consolidated Independent School District and the members of its Board of Trustees (now known as the Chisum Independent School District) — Defendants/Appellees/Respondents

Mary Milford of the Law Offices of Earl Luna, P.C. — Attorney for Defendants/Appellees/Respondents

The Honorable Jim Mattox, Attorney General of the State of Texas — Intervenor

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No. 87-156

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

W. T. "BUTCH" BURNS, *et al.*,

Petitioners

v.

DELMAR-WEST LAMAR INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals for the Sixth Judicial District at Texarkana

Respondents' Brief in Opposition to Petition for Writ of Certiorari

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioners seeking review of the Judgment of the Texas Court of Appeals for the Sixth Judicial District at Texarkana.

STATEMENT OF THE CASE

Petitioners[1] are seeking review by to this Court from the Texas Court of Appeals' dismissal of their case for want of jurisdiction. A copy of the state court Judgment appealed from is reprinted as Appendix A. On November 2, 1985, the Delmar-West Lamar Consolidated Independent School District[2] held an election which approved the issuance of $2,500,000.00 worth of bonds for purposes of building a new high school. The vote was 309 in favor of the bonds and 211 against the issuance of the bonds. Petitioners filed suit contesting the election held by the school district in *W. T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District,* Cause No. 51860. The school district replied to the election contest and filed suit for a declaratory judgment, pursuant to V.A.T.S. Article 717m-1, to determine the legality and validity of the bonds and all proceedings, including the election, affecting the bonds. *Ex Parte Delmar-West Lamar Consolidated Independent School District,* Cause No. 51980. The cases were consolidated. The attorney general was served, as required by statute, and answered.

The school district made a motion, authorized by Article 717m-1, Sec. 8, to require Petitioners to post bond should they not be able to show sufficient facts as would warrant the issuance of a temporary injunction against the issuance of the bonds. The Motion was heard and both sides pre-

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[1]This Court has docketed this case as a Petition for Certiorari. However, since jurisdiction of this Court has been invoked pursuant to 28 U.S.C. 1257(2) which is the jurisdictional statute for direct appeals, Respondents are treating this case as both a direct Appeal and Petition for Certiorari.

[2]By resolution of the Board of Trustees of the Delmar-West Lamar Consolidated Independent School District dated August 21, 1986, the district was renamed Chisum Independent School District. Its territorial limits remain unchanged.

sented testimony and evidence. On April 8, 1986, at the end of the bond hearing, the Court entered an Order requiring the Petitioners to post a bond within ten days or be dismissed from the case. On April 22, 1986, the Court dismissed Petitioners from the case for their failure to post the required bond. On April 24, 1986, the trial court entered a Judgment declaring the bonds, and all actions taken or affecting them, including the election, to be valid and legal. On July 18, 1986, Petitioners posted an appeal bond appealing from the Order of April 22, 1986, dismissing them from the consolidated suit. The appeal was heard by the Texas Court of Appeals for the Sixth District on a Transcript of the pleadings only and oral argument, since Petitioners did not have the court reporter prepare a Statement of Facts setting forth the testimony and evidence adduced by both parties at the April 8, 1986, hearing. Nor did Petitioners request the Judge to make Findings of Fact in regard to the April 8, 1986, evidentiary hearing, as authorized by Rule 296 of the Texas Rules of Civil Procedure. The Court of Appeals dismissed the appeal for want of jurisdiction because the Petitioners failed to perfect their appeal from the April 8, 1986, Order requiring them to post the bond. Petitioners appealed to the Texas Supreme Court for a Writ of Error which was refused. This appeal followed.

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. 1257(2) which provides for review by this Court:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

The decision appealed from in this case was not a decision on the federal constitutionality of Article 717m-1, Sec. 8;

rather, the decision was simply a dismissal of the appeal for want of jurisdiction. Petitioners failed to follow the proper state court procedure to appeal their case. This is not subject matter for a direct appeal to this Court. While Petitioners questioned the constitutionality of Article 717m-1, Sec. 8, at the district court level and attempted to again question the constitutionality at the appellate level, the appellate court was unable to reach this point because the Petitioners did not follow the simple procedural process established for appealing a case in state court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Article 717m-1, Tex. Rev. Civ. Stat. Ann. is a detailed statutory proceeding established to provide a rapid method of determining the validity of securities proposed to be issued by a public entity such as the Respondent school district. It authorizes the filing of a Petition by a public entity to obtain a declaratory judgment regarding the legality and validity of the proposed bonds. A key provision of the procedure is found at Sec. 8 of Article 717m-1, which authorizes the court, on motion of the school district to set and require the posting of a bond by the parties opposing the issuance of the securities. For the convenience of this Court, Sec. 8 of Article 717m-1 is reprinted as Appendix B. The purpose of the bond is to protect the school district against the damages it will incur due to the delay caused by the opposing parties continuing what is basically a meritless case. The trial court cannot require a bond if the opposing parties show any merit to their case. As stated by Article 717m-1, Sec. 8, the trial court is required to set a bond:

> Unless at the hearing on the Motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities . . .

Furthermore, the bond is payable only if the opposing parties actually lose the case after a trial on the merits.

The entirety of Article 717m-1, including Sec. 8 dealing with the bond procedure, has been held to be constitutional in respect to both the Texas Constitution and the United States Constitution. The Supreme Court of Texas, in *Buckholts Independent School District v. Glaser,* 632 S.W.2d 146 (Tex. 1983), addressed the constitutionality of the statute at length and found no constitutional defect, stating:

> The taxpayers' basic right to prosecute a lawsuit does not insulate them from damages caused to the public agency if this suit proves unfounded. They must post bond only if they fail to show entitlement to a temporary injunction.
>
> * * * * *
>
> . . . it was not an unreasonable or arbitrary action for the legislature to provide that a contestant be required to post bond for the damages accruing solely because of the pendency of this suit, to be paid *only if* the contestant should be *unsuccessful* in the suit. We agree with the trial court's determination that a legislative purpose in enacting the statute was to stop "the age old practice of allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit . . ." We find no denial of due process in the legislature's provision of a bond for damages to stop the abuse.

Petitioners in this case had their opportunity to show some merit to their case at the hearing held before the trial court on April 8, 1986. They were unable to do so. Their case was so meritless that they would not even bring forth a Statement of Facts to the Court of Appeals in Texas so that appellate court, or this Court, could review and determine whether or not the trial court erred in its evaluation of the evidence presented to it. This is a case of the age old practice of allowing, in this case, three disgruntled taxpayers to stop an entire bond issue by simply filing suit.

The constitutionality of Article 717m-1, Sec. 8, was also placed before the United States Supreme Court in the direct appeal from state court of *City of Austin v. Asmussen,* Cause 14, 267, in the Court of Appeals for the Third Supreme Judicial District, at Austin, writ ref'd n.r.e. This Court dismissed the appeal for want of a substantial federal question at 106 S.Ct. 35 (1985). Such a dismissal of a state court appeal is a decision by the Supreme Court on the merits. *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281 (1975). In *Asmussen, supra,* (the decision is reprinted in Petitioners Brief) the Court predicated its decision that Article 717m-1 was constitutional on the facts that:

> First, the bond is required only if the intervenor is unable to convince the trial court of the invalidity of the security to be issued. Second. if a bond is imposed, an appeal from that determination is available.

Petitioners, who admitted at page 15 of their Brief that they did have a hearing, were unable to show any merit to their case which would have entitled them to a temporary injunction against the issuance of the bonds. Furthermore, they did not avail themselves of the appeal that was available to them to question the imposition or amount of the bond. Petitioners have been given the basic elements required by due process, that of notice and hearing. The fact that they were unable to prevail at the trial court or refused to follow the procedural mechanism for a constitutional decision at the appellate level is not a violation of the due process clause.

The provisions of Article 717m-1 offer an opposing party to the validation of the securities a full and fair hearing before he is required to post the bond, thereby meeting the requirements of due process established in *Boddie v. Connecticut,* 401 U.S. 371 (1971). The amount of the bond is directly related to securing the financial risk to the public

agency caused by the participation of the opposing party in the proceedings. See *Lindsey v. Normet,* 405 U.S. 56 (1972).

Petitioners totally disregard these decisions and instead rely solely on the 1978 district court decision in *Pine Township Citizens Association v. Arnold,* 453 F.Supp. 594 (W.D. Penn — 1978), which is clearly distinguishable from the present case. It involved a state statutory requirement for a rather substantial bond to be posted by the Petitioner from any zoning decision *regardless of the merits of the appeal.* The only holding made by the court was that the case did present a federal question which required the convening of a three-judge court to determine the issue. The Court carefully noted that the Supreme Court had not decided that issue or a similar issue. This Court has decided that the bond requirements of art. 717m-1, the statute in question, in this case do not present a substantial federal question. Also, as both the *Buckholts* and *Asmussen* decisions pointed out, the bond is *only* required when the opposing party cannot show merit to its case.

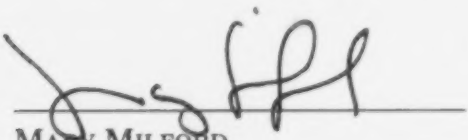
It should be noted, that this is Petitioners' second "bite at the apple" in their attempt to get this Court to review this case. In addition to this state court case contesting the election, Petitioners also filed suit in federal District Court in regard to the November 2, 1985, election which approved the bonds, alleging that the election was held in violation of the Voting Rights Act and seeking to enjoin the state court proceedings by alleging that Article 717m-1 was unconstitutional. In that case, the District Court dismissed, the Court of Appeals for the Fifth Circuit summarily affirmed and this Court refused Certiorari. *W. T. "Butch" Burns, et al. v. Delmar-West Lamar Consolidated Independent School District,* No. 86-1337 in the United States Supreme Court, October Term, 1986. Respondents request this Court to again dismiss the Petitioners case as meritless.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request this Court to deny this Petition for a Writ of Certiorari in this case.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



MARY MILFORD,
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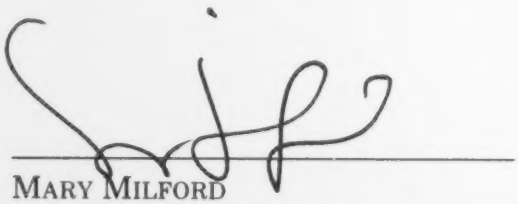
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Mary Milford, counsel of record for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondents Brief in Opposition to Petition for Writ of Certiorari on all parties required to be served, by depositing three copies of Respondents Brief in Opposition to Petition for Writ of Certiorari in the United States mail, on this 24 day of August, 1987, with first-class postage, addressed to Mr. Frank Moore, Attorney at Law, 41 West Side Square, Cooper, Texas 75432, counsel of record for the Petitioners, and to Mr. Leroy Grawunder, Assistant Attorney General, 201 Barton Springs Road, Austin, Texas 78701.



MARY MILFORD
Counsel of Record for Respondents

APPENDIX

Court of Appeals
Sixth District
Texarkana, Texas

No. 9511

W. T. "BUTCH" BURNS, TED CARRINGTON AND DWIGHT STEGALL

Appellants

v.

DELMAR-WEST LAMAR CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

Appellee

Appealed from the 62nd Judicial District Court of Lamar County, Texas

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This is a school bond election appeal. Because the appellants have failed to follow the mandates of Tex. Rev. Civ. Stat. Ann. art. 717m-1, § 8 (Vernon Supp. 1986), we dismiss the appeal for want of jurisdiction.

In response to the appellant taxpayers' election contest, the appellee school district answered and filed a separate suit seeking a declaratory judgment that the bond proceedings were valid pursuant to Tex. Rev. Civ. Stat. Ann. art. 717m-1 (Vernon Supp. 1986). The two causes were consolidated. The trial court then granted the school district's motion to require the appellants to post bond as authorized by Article 717m-1, § 8, and entered an order to this effect dated April 8, 1986. The appellants were dismissed for failure to post the bond on April 22. It is from the April 22 dismissal that the appellants bring this appeal.

Article 717m-1, § 8, in relevant part reads as follows:

> In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after

> entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, ... In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, ...

Appellants neither posted the bond nor appealed from the April 8 order requiring such bond. Article 717m-1, § 8, therefore operates to deprive this Court of jurisdiction to consider the appellants' contentions. *Buckholts Independent School District v. Glaser,* 632 S.W. 2d 146 (Tex. 1982); *Rio Grande Valley Sugar Growers v. Attorney General,* 670 S.W. 2d 399 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

Appellants contend, however, that the statute unconstitutionally deprives them of due process because it requires the posting of a bond before a final determination of the merits and as a prerequisite to an appeal, even though the plaintiffs may be unable to make the bond.

The constitutionality of these provisions has been upheld against similar attacks. *Buckholts Independent School District v. Glaser,* supra; *Rio Grande Valley Sugar Growers v. Attorney General,* supra. The statute does not expressly deny a waiver of the bond for indigents. *Buckholts Independent School District v. Glaser,* supra. Appellants were afforded a hearing on the feasibility of a bond being required, yet there has been no evidence brought forward here tending to show that they are indigent and no claim of indigency is raised here.

Appellants also argue that the judgment is void, and for that reason it can be attacked on the merits here, even though they did not avail themselves of the right to appeal the judgment in the manner provided by the statute. They base their argument on the contention that the school district was not a legal entity and therefore could not call a valid election.

As the court had jurisdiction of the proceedings and the parties below, its judgment was not void. If, as appellants urge, the judgment was erroneous, their remedy was to appeal by following the statute. Failing to do so, they cannot now challenge the issues which were or could have been raised in the proceeding below. *Burris' Estate v. Associated Employers Insurance Co.*, 374 S.W. 2nd 223 (Tex. 1963); *Ex parte Sutherland*, 515 S.W. 2d 137 (Tex. Civ. App.-Texarkana 1974, writ dism'd); 48 Tex. Jur. 3d *Judgments* § 277 (1986).

The appeal is dismissed at appellants' costs.

WILLIAM J. CORNELIUS

William J. Cornelius
Chief Justice

October 21, 1986
Filed October 21, 1986

Publish

TEX. REV. CIV. STATS. ANN. — Art. 717m-1

Bond

Sec. 8. At any time prior to entry of final judgment in the proceedings, the public agency may ask the court for an order that any opposing party or intervenor, except the attorney general, be dismissed unless the opposing party or intervenor shall post a bond with sufficient surety, approved by the court, payable to the public agency for the payment of all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court shall then issue an order directed to the opposing party or intervenor, which order, together with a copy of the motion, shall be served on the opposing party or intervenor, or on his attorney of record, personally or by registered mail, requiring the opposing party or intervenor to appear at the time and place, not sooner than 5 nor later than 10 days after entry of the order, as the court may direct, and show cause why the motion should not be granted. Motions with respect to more than one opposing party or intervenor may be heard together if so directed by the court. Unless at the hearing on the motion the opposing party or intervenor establishes facts which, in the judgment of the court would entitle him to a temporary injunction against the issuance of the securities, the court shall grant the motion of the public agency and in its order the court shall fix the amount of the bond to be posted by the opposing party or intervenor in an amount found by the court to be sufficient to cover all damages and costs which may accrue by reason of the delay as will be occasioned by the continued participation of the opposing party or intervenor in the proceedings in the event that the public agency finally prevails and obtains substantially the judgment prayed for in its petition. The court in its discretion may receive evidence at the hearing or any adjournment with respect to the amount of the damages and costs, which shall include but not be limited to anticipated

increases in interest rates and in construction and financing costs. If more than one opposing party or intervenor is a participant in the proceedings, the court in its discretion may allocate the amount of the bond among the opposing parties or intervenors according to the extent or degree of their participation in the proceedings, but may fix the amount of the bond to be posted by a particular opposing party or intervenor only if a motion as described in this section was made and granted as to the opposing party or intervenor. In the event a bond with sufficient surety is not filed by the opposing party or intervenor within 10 days after entry of the order of the court fixing the amount of the bond, the opposing party or intervenor shall be dismissed by the court. The dismissal shall constitute a final judgment of the court, unless an appeal was taken as provided by this Act. No court shall have further jurisdiction of any action to the extent the action involves any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised by an opposing party or intervenor as to whom no motion was made hereunder. An order of the court fixing the amount of the bond to be posted by an opposing party or intervenor or denying the motion of a public agency or dismissing a party for failure of file a bond may be appealed as provided in Section 9 of this Act. The court to which any appeal is taken may modify the order of the lower court and may enter the modified order as the final order. In the event no appeal is taken or if the appeal is taken and the order of the lower court is affirmed or affirmed as modified, and no bond is posted pursuant to this section within 10 days after entry of the appropriate order, no court shall have further jurisdiction of any action to the extent it shall involve any issue which was or could have been raised in the proceedings, except to the extent that the issue may have been raised in the proceedings by an opposing party or intervenor as to whom no motion was made hereunder. It is further provided that, on motion of the public agency, the court shall proceed without delay to hearing and trial on the merits of the public agency's petition, regardless of the pendency of an appeal from any order entered pursuant to this section.

Appeal

Sec. 9. Any party to the cause, whether the public agency, a defendant, intervenor, or otherwise, dissatisfied with any order entered paramount to Section 8 of this Act, or with the judgment in the declaratory judgment action, may appeal therefrom to the appropriate court of civil appeals after the entry of the order or judgment, or the order or judgment shall become final. The appeal shall take priority over all other cases, causes, or matters pending in the court of civil appeals, except habeas corpus, and it shall be mandatory that the court of civil appeals assure the priority and act thereon and render its final order or judgment therein with the least possible delay. The Supreme Court shall have authority to review, by writ of error or other authorized procedure, all questions of law arising out of the orders and judgments of the courts of civil appeals in the cases, in the manner, time, and form applicable in other civil causes where a decision of the court of civil appeals is not final, but any such review shall take priority over all other cases, causes, or matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment therein with the least possible delay. Also, Rule 499a, Texas Rules of Civil Procedure, shall apply to proceedings in the district court, but any direct appeal thereunder shall take priority over all other cases, causes, and matters pending in the Supreme Court, except habeas corpus, and it shall be mandatory that the Supreme Court assure the priority and review and act thereon and render its final order or judgment with the least possible delay.